## SUBJECT INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statement of the Case | 2 |
| Argument | 5 |
| I. | |
| There Is No Certiorari Jurisdiction | 5 |
| A. The Federal Grounds Now Urged Were Not Properly Raised as Required by Nevada Procedure | 5 |
| B. The Nevada Supreme Court Decision Was Based on an Adequate Nonfederal Ground | 7 |
| II. | |
| There Is No Important Federal Question Presented | 9 |
| Conclusion | 10 |

## TABLE OF AUTHORITIES CITED


Bailey v. Anderson, 326 U.S. 203 (1945) ..... 6

Britz v. Consolidated Casinos Corp., 87 Nev. 441, 488 P.2d 911 (1971) ..... 5

Clark County v. State, 65 Nev. 490, 199 P.2d 137 (1948) ..... 5

Cottonwood Cove Corp. v. Bates, 86 Nev. 751, 476 P.2d 171 (1970) ..... 5

Ferguson v. Georgia, 365 U.S. 570 (1961) ..... 6

Haynes v. Buckley, 165 Cal. App. 2d 96, 331 P.2d 693 (1958) ..... 8

Howard's Estate, 48 Nev. 106, 232 P. 783 (1924) ..... 5

Hulbert v. Chicago, 202 U.S. 275 (1906) .....5, 6

Lamkin, In re, 355 U.S. 59 (1957) ..... 6

Lorring, In re, Petition of, 75 Nev. 334, 349 P.2d 156 (1959) ..... 5

Lynch v. Nev. ex rel. Pierson, 293 U.S. 52 (1934) ..... 6

McCracken v. Teets, 41 Cal. 2d 648, 262 P.2d 561 (1953) ..... 8

Paradise Palms Community Association v. Paradise Homes, 86 Nev. 859, 477 P.2d 859 (1970) .. 1

Ratliff v. Sadler, 53 Nev. 292, 299 P. 674 (1921) ..... 8

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1954) ..... 10

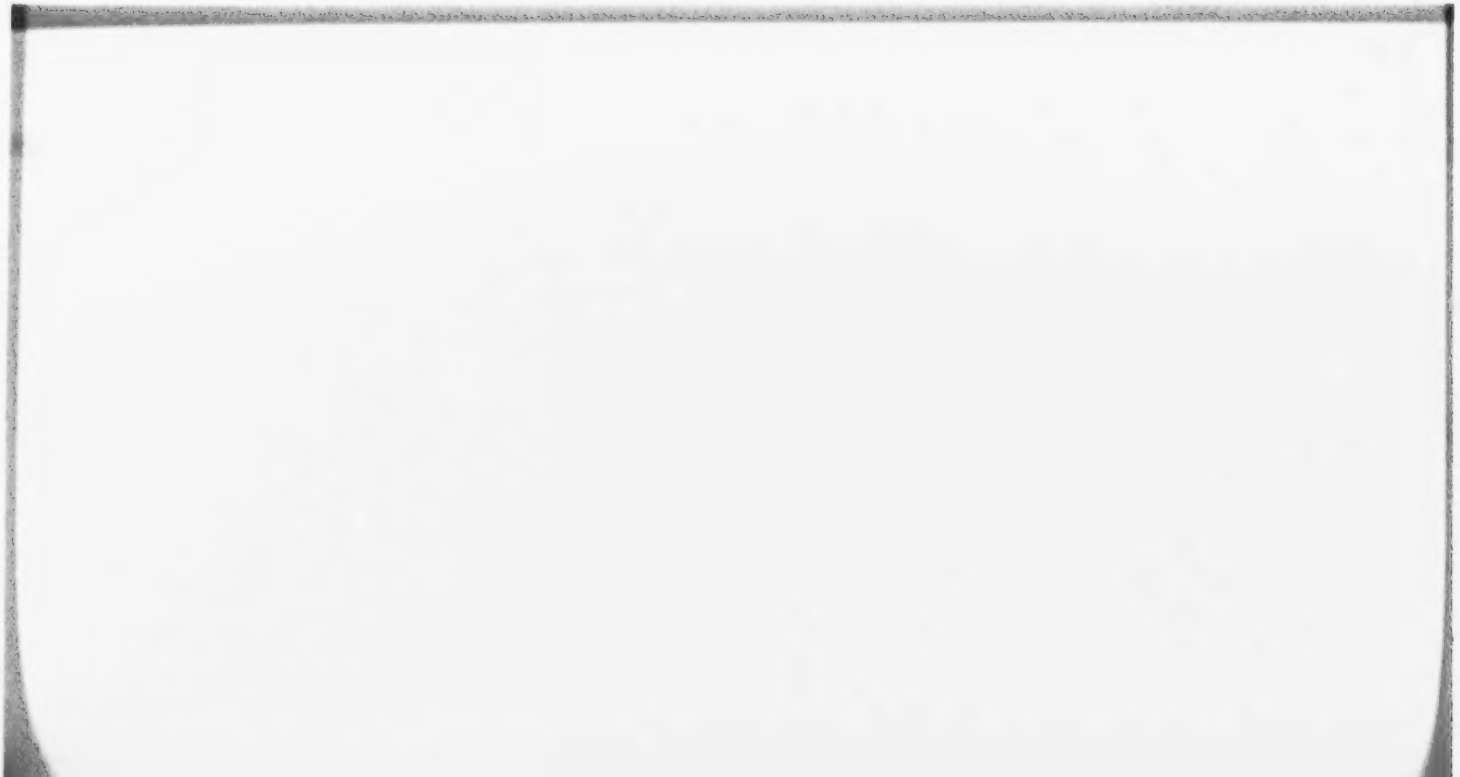
Williams v. Georgia, 349 U.S. 375 (1954) ..... 5

Rules Page

Rules of the Supreme Court of United States, Rule 23 1(f) ..... 6

Statutes

Nevada Revised Statutes, Sec. 21.210 ..... 2



IN THE

# Supreme Court of the United States

October Term, 1972
No. 72-1561

PARADISE PALMS COMMUNITY ASSOCIATION,
*Petitioner,*

*vs.*

PARADISE HOMES, IRWIN MOLASKY and HARRY LAHR,
*Respondents.*

**On Petition for Writ of Certiorari to the Supreme Court of Nevada.**

## BRIEF FOR RESPONDENTS IN OPPOSITION.

### Opinions Below.

The opinion of the Nevada Supreme Court (App. B of Petition) is reported at 89 Nev. ...., 505 P.2d 596 (1973). The opinion in the prior action, *Paradise Palms Community Association v. Paradise Homes* (App. F of Petition) is reported at 86 Nev. 859, 477 P.2d 859 (1970).

### Jurisdiction.

There is no certiorari jurisdiction. No federal question was raised by petitioner in the Nevada courts until it filed its Petition for Rehearing, which was too late to raise such a question. The claimed substantial federal question was not raised at any time. The Nevada Supreme Court decision is based on an adequate nonfederal ground.

**Questions Presented.**

1. Was a federal question raised at the appropriate stage of the Nevada proceedings?

2. Was the decision below based on an adequate nonfederal ground?

3. If questions 1 and 2 are answered in the affirmative, is there an important federal question presented?

**Statement of the Case.**

In the prior action respondent Paradise Homes (hereinafter "Paradise") on January 29, 1968, filed an action against petitioner to recover on a $23,000.00 promissory note. [R. 98.] Service was subsequently effected on Mr. Irwin Molasky. [Supp. R. 2.] A default judgment was entered on February 23, 1968. [R. 100.] On March 25, 1968, petitioner's property was sold at an execution sale. [R. 101-103.] Under Nevada law, such property was redeemable any time within 1 year after sale. (NRS 21.210.) Mr. Paul Sorenson, who admitted he "could possibly have been" aware of the execution sale before it occurred, communicated on April 4, 1969, with Paradise's attorney who agreed not to do anything with the property for three months. Sorenson then told him "I would take appropriate action when I deemed it appropriate to set aside any judgment they had secured." [Supp. R. 20-22.]

Almost 18 months later, petitioner filed a Motion to Set Aside Judgment. The motion was signed by Sorenson, an attorney, as "Member". The grounds of the motion were that Molasky was not an officer of petitioner, a fact Paradise was alleged to have known,

and alternately, if he was an officer, he had violated his duty as such. [R. 107-108.]

A hearing was held on November 3, 1969, at which Sorenson represented petitioner. He introduced evidence, both oral and documentary [R. 6-43], that showed, *inter alia,* that petitioner was a moribund organization and that only one person who had been a director still lived in the area. [R. 11-19.] The motion was denied on November 7, 1969. [R. 110.] On November 21, 1969, petitioner filed a Motion to Amend or Alter Judgment, again signed by Sorenson as "Member". [R. 113, 114.] After a hearing, that motion was denied on December 11, 1969. In its order denying the motion, the Court said the following:

> ". . . The Court does hereby make and adopt as its Finding of Fact and Conclusion of Law, with respect to the motion of the defendant to set aside judgment, the following:
>
> FINDING OF FACT:
>
> That at the time of service of process upon the defendant, IRWIN MOLASKY was the Secretary of the defendant.
>
> CONCLUSION OF LAW:
>
> Service of process upon the defendant was made as provided by law." [R. 115.]

Petitioner filed a Notice of Appeal from both orders of denial. (App. F of Petition.) After argument of that appeal, and on December 14, 1970, the Nevada Supreme Court affirmed the denials of both motions because the appeal from the denial of the motion to vacate was not timely filed. (App. F of Petition.)

The present action was commenced on March 4, 1971.[1] The complaint contains three causes of action. [R. 1-12.] The first cause seeks to have the judgment in the prior case declared void on the ground that Mr. Molasky was not an officer of petitioner at the time he was served. The second cause is predicated on the claim that Mr. Molasky was an officer of petitioner and by reason of his failure to take action after service of process, the sale was void and respondent Paradise Homes should be declared a trustee of the land sold on execution. The third cause seeks damages against respondent based on the facts alleged in the first two causes.

No federal ground for any of the relief sought is mentioned, directly or indirectly, in the complaint. No federal statute, constitutional provision, federal or state, was cited or alluded to, directly or indirectly. The words "fair trial", "due process of law" or "opportunity to be heard" which appear in petitioner's Petition for Rehearing (App. D of Petition) or words of similar import do not appear in the complaint.

Respondents' answer to the complaint affirmatively pled the defense of collateral estoppel. [R. 22, 23.] Summary judgment was granted with respect to the first cause of action. [R. 175.] Such judgment was affirmed on appeal. (App. B of Petition.)

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[1]More than 3 months after commencement, respondent took the deposition of Paul Heit, who described himself as the "acting president" of petitioner. He testified that Sorenson was president of petitioner, but resigned "within the last few months." [Heit Depo. 6/14/71, p. 15.] He also testified that the only authority for the filing of the action came from Sorenson, whom he assumed was acting as legal counsel for the petitioner. [Heit Depo. 12/3/71, pp. 12-16.]

## ARGUMENT.

### I.

### There Is No Certiorari Jurisdiction.

**A. The Federal Grounds Now Urged Were Not Properly Raised as Required by Nevada Procedure.**

Nevada does not permit a point not urged in the trial court, unless jurisdictional, to be considered on appeal. The most recent Nevada expression on the subject is *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971):

> ". . . A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal [citing cases]."

*See also, Cottonwood Cove Corp. v. Bates,* 86 Nev. 751, 476 P.2d 171 (1970); *Clark County v. State,* 65 Nev. 490, 199 P.2d 137 (1948).

It is also firmly settled law in Nevada that the Nevada Supreme Court will not consider a point raised for the first time in a petition for rehearing.

> "It has been the universal practice to deny a petition for rehearing when based on a ground not urged upon the original hearing [citing cases]. *Howard's Estate,* 48 Nev. 106, 107, 232 P. 783 (1924).
>
> "It has long been a rule of this court that we shall not consider points raised for the first time in a petition for rehearing." *In re Petition of Lorring,* 75 Nev. 334, 335, 349 P.2d 156 (1959).

State procedure which forbids late raising of federal questions is a valid exercise of state power. *Williams v. Georgia,* 349 U.S. 375, 382-3 (1954); *Hulbert v.*

*Chicago,* 202 U.S. 275 (1906). Such procedure must be followed before this Court's jurisdiction can be invoked. *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *In re Lamkin,* 355 U.S. 59 (1957).

Rule 23 1(f) of this Court's Revised Rules requires a detailed showing of the manner in which the federal questions have been raised, including "the stage in the proceedings in the court of first instance." Petitioner's purported compliance with such requirement is its statement that the federal question was raised "by opposing respondent's motion for summary judgment." (Petition at 6.) That opposition, which consists of a three-page "Memorandum in Opposition to Defendant's Motion for Summary Judgment" is part of the record. [R. 141-143.] Just as the complaint raises no federal question, that memorandum also raises none. It cites only two authorities, both Nevada, neither of which involves any federal question.

Even though the Nevada Supreme Court will not review a federal question not raised at the trial level, no claim is made by petitioner that the federal questions sought to be raised were raised in the Supreme Court before the rehearing petition. And even if the Nevada procedure was otherwise, appellate briefs are not part of the record and no claim of jurisdiction could be predicated on those briefs. *Lynch v. Nev. ex rel. Pierson,* 293 U.S. 52, 54 (1934).

No mention of any federal question appears in the opinion of the Nevada Supreme Court on the appeal (App. B of Petition) or the Order Denying Petition for Rehearing. (App. F of Petition.) It is assumed that the silence is due to the procedural deficiency. *Bailey v. Anderson,* 326 U.S. 203, 206, 207 (1945).

Point IV of the Petition raises the issue of whether due process permits an appearance by a member of an association to bind the association, and declares that the Nevada Supreme Court failed to address itself to this issue. (Petition at 11.) *This issue was never previously raised—not even in the Petition for Rehearing.* Thus, it is clear that no federal question has been appropriately raised in the proceedings below so as to give this Court certiorari jurisdiction.

**B. The Nevada Supreme Court Decision Was Based on an Adequate Nonfederal Ground.**

The opinion below held in favor of respondents on the ground of collateral estoppel. No federal ground was considered, because none was presented. Petitioner argues that collateral estoppel was an improper ground because petitioner was not properly served in the prior action. Petitioner does not claim that the issue of service was not litigated in the prior action, but instead relies upon the contention that the lower court in the prior action ruled that Sorenson had no standing to bring the motion to vacate and such ruling was approved by the Nevada Supreme Court. (Petition at 10.)

This is not true. While the trial judge in the first action, after finding valid service upon Mr. Molasky, did state "it does not appear that applicant has any standing to make such motion" (A. 110),[2] he did, when ruling on the subsequent motion, clarify the motion by making an appropriate finding of fact and conclusion of law, limited to the service issue. [R. 115.] It

[2]Contrary to petitioner's repeated claims, the court in the prior action had not "held" (Petition at 11) or "found" (Petition at 11, 12) that Sorenson lacked standing. It is only the above-quoted language that was used on one occasion.

is well settled law in Nevada, and elsewhere, that findings cannot be impugned by prior opinions and it is the former only which can be considered on appeal. *Haynes v. Buckley*, 165 Cal. App. 2d 96, 331 P.2d 693 (1958); *McCracken v. Teets*, 41 Cal. 2d 648, 262 P.2d 561 (1953); *Ratliff v. Sadler*, 53 Nev. 292, 299 P. 674 (1921).

The motion to vacate, as well as the notice of appeal, in the prior action were filed, not in the name of Sorenson, but in the name of petitioner. The Nevada Supreme Court, in both of its opinions, found that petitioner had filed the motion and appeal. (App. F of Petition, p. 36, App. B of Petition, p. 20). In the prior action, the Court declared that the trial court "found" Molasky was an officer of petitioner (App. F of Petition, p. 36) and in the opinion below, the Court said that "that issue of fact was adjudicated in the first case." (App. B of Petition, p. 20.)

Thus, we have the situation where the Nevada Supreme Court has consistently determined that the trial court in the prior action had denied the motion to vacate because service on Molasky was proper. In doing so, it was exercising its manifest right to decide the effect of proceedings held in one of its lower courts—to decide what construction to give to lower court pronouncements made during such proceedings, and assuming *arguendo*, inconsistencies in such lower court pronouncements, to resolve such inconsistencies. For this Court to hold that such determinations were constitutionally impermissible, because this Court construes their effect otherwise than the Nevada Supreme Court did, would suddenly elevate to federal constitutional proportions determinations with respect to matters of trial

court procedure—matters which truly involve state law and not federal questions.

The holding below that collateral estoppel precluded relitigation of petitioner's first cause of action, a holding on the only issue properly presented to the Nevada Supreme Court, was a determination made by it upon an adequate nonfederal ground.

II.

**There Is No Important Federal Question Presented.**

The Nevada Supreme Court did not hold that collateral estoppel was properly invoked because of a judicial determination in a prior proceeding in which petitioner was not served or in which it did not appear. As pointed out by petitioner, Nevada law clearly holds that a judgment is void if proper service of process is not made and such a judgment is subject to collateral attack. (Petition at 9, n.(2).) Rather, the Court held after a hearing at which petitioner participated and at which the trial court found that service had been validly made upon a person who was an officer of petitioner, that the issue of whether such person was an officer could not be relitigated.

Surely the question of the Nevada Supreme Court's construction of the trial court's actions, does not involve any federal question, let alone an important one.

Petitioner has attempted to posture a question of "national importance", namely "whether or not an appearance by a single member can bind an association." (Petition at 7, 8.)

This question was not raised at any stage of the Nevada proceedings and assuming *arguendo* that Nevada could not constitutionally hold that litigation of an

issue by a member of a moribund homeowners association, this question would be one applicable to petitioner only and not be one which presents a federal question of substance. *Cf., Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1954).

**Conclusion.**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL S. LIONEL, ESQ.,
*Counsel for Respondents.*